

AMLA 2020 Series Part 3: FinCEN Issues Notice of Proposed AML Rules for Antiquities Dealers

On New Year's Day 2021, Congress passed the Anti-Money Laundering Act of 2020 (AMLA 2020). As we [reported](#) last April, the AMLA 2020 included sweeping reforms aimed at strengthening protections against money laundering, terrorism financing, and other illegal activities. In previous installments to this series, we discussed [new and expansive beneficial ownership requirements](#) and [significant enhancements to the Bank Secrecy Act \(BSA\) whistleblower program under the act](#). In this third installment in the series, we will examine expansion of BSA/anti-money laundering (AML) obligations to antiquities dealers, who have to date not been subject to AML rules and regulations.

On September 24, the Financial Crimes Enforcement Network (FinCEN) issued [an advanced notice of proposed rulemaking](#) seeking comments on the implementation of a provision of AMLA 2020 requiring that dealers in antiquities, an industry that has been largely unregulated until now, be subject to AML rules under the BSA. For years, lawmakers and watchdogs have expressed concerns that bad actors have been exploiting the secrecy of the antiquities trade to facilitate money laundering and terrorist financing. [\[1\] Recent headlines](#) on the looting of cultural heritage sites in the Middle East and the sale of artifacts from these sites on the black market have amplified these concerns.

The AMLA 2020 requires regulation of the antiquities trade by amending the BSA to include antiquities dealers, including advisors, consultants, or any other person who engages as a business in the solicitation or the sale of antiquities. BSA-regulated entities must implement rigorous procedures to prevent illicit financial activity and ensure compliance with the law, including monitoring transactions for red flags as to potential misconduct, reporting suspicious activity, and conducting robust customer due diligence. Under this rubric, there is a range of requirements applied to different types of regulated entities. FinCEN's notice seeks practical comments on how best to implement the statute's requirements for the antiquities trade. Comments are due by October 25, 2021.

FinCEN's notice invites comments on a wide range of questions that will help them identify who qualifies as a dealer in antiquities, what an antiquity is, and what effective know-your-customer requirements should look like in the antiquities market. To answer these questions, FinCEN may take a similar path to the one it followed in extending the BSA to the trade of precious metals, stones, and jewels in [2005](#). However, FinCEN is seeking comments on how AML risks in the antiquities trade arise and, based on those comments, may impose more or less burdensome requirements on dealers in this space, including potentially requiring suspicious activity reporting.

Below we discuss some of the key areas and issues FinCEN seeks to explore in this request for comments.

Antiquities Market Background. First, FinCEN is seeking information on the basics of the antiquities trade in order to define the categories of entities and individuals who may be subject to the regulations. The agency wants to know if there are any commonly understood definitions for the roles and responsibilities of those involved in the trade. It also asks how to distinguish a work of art from an antiquity. Further, the notice requests information about how antiquities transactions take place—are they leveraged or paid for in cash? FinCEN would also like to know where the funds for a transaction typically originate. Moreover, the agency is seeking input as to the breakdown of the antiquities market based on the value of the transactions (e.g., X% of all

transactions are above \$Y), which may be helpful to the agency in setting value thresholds to determine both what market players should be regulated and what types of transactions should be subject to reporting requirements.

Flow and Exchange of Information. Second, FinCEN wants to know about the antiquities market's current experience with money laundering and other illicit financial activity. For instance, to what information do those in a transaction typically have access? What information does the buyer receive in relation to the seller and to what information is or should the buyer be entitled? What information does the seller receive in relation to the buyer and the payment? FinCEN also wants to know why this information might be withheld in some transactions. FinCEN then asks what areas of the antiquities market are particularly vulnerable to illicit financial activity. The agency wants to understand if these factors might be based on geography and how foreign-based participants may affect the risk factors in a particular transaction.

Current AML Standards. Third, FinCEN is seeking comments on how the antiquities market currently addresses such risks. The agency seeks comments about any safeguards the market is currently implementing to protect against illicit financial activity. For instance, the agency wishes to understand the type of due diligence market participants currently conduct in different types of transactions and which market participants can most effectively identify and guard against illicit financial activity.

Implementation of Final Rules. Finally, FinCEN requests detailed comments as to how its final rules should be implemented to most effectively address money laundering in the antiquities market. FinCEN wants to explore how feasible it would be to distinguish antiquities transactions by amount and purpose (e.g., for-profit v. not-for-profit activity) and how to approach setting these limits. FinCEN would also like to understand how the burden of the existing regulatory framework for financial institutions would affect the antiquities trade. For example, how would know-your-customer requirements apply in this context and what potential negative effects might disclosures have on the trade?

While the scope and breadth of these new rules remains uncertain, bringing the antiquities trade under the BSA regulatory framework will undoubtedly be a sea change for a well-established, global industry that, until now, has operated free of regulation. Interested market participants have until October 25 to submit comments as to the many critical aspects of this rule. Particularly given the agency's relative unfamiliarity with this industry, the comments FinCEN receives have the potential to significantly affect the final rulemaking process.

We will continue monitoring developments and provide an update as these regulations take shape. In the meantime, interested parties should consult with counsel regarding the potential implications of the FinCEN's notice in relation to their particular business and consider whether comments on any aspect of the agency's proposal would be prudent.

Endnotes

[\[1\] Staff S. Comm. On Homeland Sec. & Gov't Affairs, 116th Cong., Rep. on the Art Industry and U.S. Policies That Undermine Sanctions \(2020\).](#)

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